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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

J. J. BROLAN ET AL., PLAINTIFFS IN error,
v.
THE UNITED STATES.
No. 645.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

THE STATUTE INVOLVED.

The decision of this case will affect not only the particular statute in question—the Opium Exclusion Act—but also many other statutes prohibiting imports of articles destructive of the National welfare. The case is, therefore, of deep consequence to the health and morals of the American people.

The imposing array of 53 assignments of error filed by the plaintiffs in error has in its progress from the district court to its review by this Court dwindled to the four points set forth on the last page of the brief of the plaintiffs in error. The four points being the only ones argued therein, no

other specific assignments of error are considered in this brief.

The statute involved is the Opium Exclusion Act of February 9, 1909, c. 100 (35 Stat., 614), section 2:

> That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, *or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both.* Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury.

The only portion of this section claimed to be unconstitutional by the plaintiffs in error is italicized *supra*, and the grounds of their opposition as stated in their brief (pp. 16, 17), are as follows:

> (*a*) It is an interference with the police power of the State, and
>
> (*b*) It is an exercise of a power not granted Congress by the Constitution.

GENESIS AND PURPOSE OF THE OPIUM ACT.

(1) The evil against which the Opium Act was directed was Nation-wide, affecting the moral conditions, the health, the physique, and the social welfare of the country. It was a National evil, which the State governments had been found powerless to prevent, to control, or to lessen.

The moral and physical disasters attendant upon the growth of the opium habit are too well recognized to need lengthy discussion. The report rendered to Congress January 1, 1910, by the American delegates on the International Opium Commission will serve to illustrate the conditions which gave rise to the Act. (Senate Doc. No. 377, 61st Cong., 2d sess., pp. 34, 44, 45):

> * * * it is an undoubted fact that about 1860 the opium-smoking habit began to spread from our Pacific coast over the Rockies and through our middle and eastern centers of population. Primary infection was from the Chinese, but it soon spread from white to white and from black to black. Nearly every State in the Union at once awoke to the peril of this vice, and State and municipal laws have been passed from time to time to counteract the evil; but it has come out quite clearly by investigation that it was impossible to effectually enforce State and municipal ordinances against opium smoking or the opening of opium divans in the face of the fact that the Federal Government by tariff laws permitted the importation and by excise laws permitted the manufacture of the drug (p. 45).

(2) The evil against which the Opium Act was directed was one which the National Government had found itself unable to prevent, control, or lessen by imposition of tariff taxes, even at alleged prohibitory rates. In fact, the higher the rate, the more opium was brought into the country through smuggling.

Opium in the tariff acts:

The tariff act of July 14, 1832 (4 Stat. 590), placed opium on the free list. The act of March 2, 1833 (4 Stat. 629), placed opium on the free list from and after June 30, 1842. The act of August 30, 1842 (5 Stat. 558), imposed a duty of 75 cents per pound, and subsequent tariff acts imposed duties ranging from 15 per cent ad valorem to $1, $2.50, and $6 per pound; July 30, 1846 (9 Stat. 47); March 3, 1857 (11 Stat. 192); March 2, 1861 (12 Stat. 182); August 5, 1861 (12 Stat. 292); June 30, 1864 (13 Stat. 212); July 14, 1870 (16 Stat. 265); March 3, 1883 (22 Stat. 1495).

The act of October 1, 1890 (26 Stat. 608), placed crude opium on the free list, but imposed a duty of $12 per pound on smoking opium. Subsequent acts—August 27, 1894 (28 Stat. 510, 542); July 24, 1897 (30 Stat. 153); August 5, 1909 (36 Stat. 14); October 3, 1913 (38 Stat. 117)—imposed duties varying from $1 to $6 per pound. The act of August 27, 1894 (28 Stat. 542), however, placed opium containing 9 per cent or over of morphia on the free list.

See also Act of March 3, 1897 (29 Stat. 695); Act of February 14, 1902 (32 Stat. 33).

Opium treaty:

The treaty of November 27, 1880, article II, between the United States and China (22 Stats. 828) contained the following provision:

> The Governments of China and of the United States mutually agree and undertake that Chinese subjects shall not be permitted to import opium into any of the ports of the United States; and citizens of the United States shall not be permitted to import opium into any of the open ports of China; to transport it from one open port to any other open port; or to buy and sell opium in any of the open ports of China. This absolute prohibition, which extends to vessels owned by the citizens or subjects of either power, to foreign vessels employed by them, or to vessels owned by the citizens or subjects of either power and employed by other persons for the transportation of opium, shall be enforced by appropriate legislation on the part of China and the United States; and the benefits of the favored-nation clause in existing treaties shall not be claimed by the citizens or subjects of either power as against the provisions of this article.

The first bill to provide for the execution of the provisions of the above treaty was introduced January 18, 1884, in the Senate (48th Cong., 1st sess., S. bill No. 1158). The bill passed the Senate, but failed in the House. The second bill to provide for the execution of the provisions of the treaty was introduced in the Senate (49th Cong., 2d sess., S. bill

No. 3044) and became the law of February 23, 1887 (24 Stats., 409).

The result of the provisions of the treaty of 1880 with China was that, though Chinese subjects resident in the United States were prohibited the importation of opium, American citizens have imported the drug in a form prepared for smoking, and have immediately handed it over to Chinese subjects, who have distributed it throughout the country, not only to Chinese but to all who have become addicted to the opium habit. (Report of Commission, Senate Doc. No. 377, 61st Cong., 2d sess.)

The result of the attempt to control imports of opium by imposing high tariff duties was simply to increase smuggling, and there was not only no diminution but a great increase in the introduction of opium into the United States. (See Senate Doc., *supra*, No. 377, pp. 30–45.)

> Whatever errors must be allowed for in these calculations, there has nevertheless been a per cent increase in our importations of smoking opium out of all proportion to our per cent increase in total population; this, too, of a form of opium the entry of which should never have been legalized (p. 39).

(3) The evil against which the Opium Act was directed was one which could only be successfully dealt with by international action, and by absolute prohibition of importation into the United States, other nations co-operating with legislation to assist in enforcement of suppression of the opium traffic. With this end, the United States suggested the

convening of the first International Opium Commission in 1909, and enacted the Opium Act of 1909 in pursuance of this policy, with the expectation of similar action by other nations. To a certain degree, therefore, the Opium Act of 1909 was passed in fulfillment of an international obligation.

From 1903 to 1906 appeals were made to the President and the Secretary of State for the initiation of an international conference on the opium problem and at the suggestion of the United States an international commission was convened (as stated in the Report of Jan. 1, 1910, of the American delegates on the International Opium Commission, Senate Doc. 377, 61st Cong., 2d sess., p. 64):

> The powers originally invited to the commission were those having territorial possessions in the Far East, namely, China, France, Germany, Great Britain, Japan, the Netherlands, Portugal, Russia, and Siam. Further consideration of the subject showed that the opium question could not be thoroughly studied and reported unless the large opium-producing countries were represented in the commission, even though they had no territorial possessions in the Far East. Therefore, an invitation was extended to Persia and Turkey, and finally, because of their large commercial interests in the Far East, to Austria-Hungary and Italy. It followed that, including the United States, thirteen countries sent delegates to the International Opium Commission. Turkey was not represented,

owing to the political upheaval that had just occurred in that country.

On May 11, 1908, President Roosevelt transmitted to Congress a letter of recommendation from Secretary of State Root (House Doc. No. 926, 60th Cong., 1st sess.) recommending an appropriation for the participation of the United States in the Joint International Commission on January 1, 1909. This letter termed it an investigation of a "subject so important to humanity."

The President's message stated:

> While the policy of the United States has been clear and positive to prevent American citizens from having any part in imposing the evils that follow the use of opium upon the people of China and in using all possible means to prevent the use of opium in the Philippines, there is reason to believe that sufficient attention has not been given to prevent the importation of the drug into the United States. The importation of opium into the United States in the year ending June 30, 1907, amounted to 728,530 pounds. While the international investigation now proposed relates to opium in the Far East, an incidental advantage of the investigation may be to point out the necessity and the best method of restricting the use of opium in the United States.
>
> The commercial aspect of the subject involves such complicated and widespread trade relations that an effective treatment of it seems impossible unless it be by the con-

current action of the great commercial nations, together with those peoples of the Orient among whom the abuse is most prevalent.

Congress by Act of May 27, 1908, appropriated $20,000 for the expenses of the American delegates, and Dr. Hamilton Wright, of Washington, D. C., Bishop Charles H. Brent, of the Philippine Islands, and Dr. Charles D. Tenney, secretary to the American Legation in China, were appointed commissioners. The meeting of the Commission was to have been held on January 1, 1909, but owing to the recent death of the Emperor and Empress Dowager of China was postponed until February 1, 1909. The Commission adjourned February 26, 1909, but meanwhile (as stated in the Report of the American delegates, pp. 51–52):

> While the diplomatic correspondence proceeded it became apparent to the Department of State that there was a large misuse of opium in the continental United States. When this had been sufficiently demonstrated by the opium commission, it became the bounden duty of our Government to take some steps to clear up the home problem before the American delegates to the International Opium Commission should be brought face to face with the delegations of the other powers. Otherwise the American people stood to be accused of living in a glass house that no doubt would have been shattered on their heads.
>
> Based on investigations made in the United States during the summer and autumn of 1908,

> a letter was addressed to the department on October 26, 1908, calling attention to the two main facts that had been disclosed: First, that the Federal Government was legalizing the importation and manufacture of smoking opium in spite of the fact that nearly every State and municipality in the Union had a law against its sale and use, and that it was absolutely necessary that this anomalous position should be cleared by prohibitory legislation before the meeting of the International Commission at Shanghai; second, that State and municipal laws would continue to be to a large extent ineffective as long as there was an unrestricted importation of crude or medicinal opium, its manufacture into morphine, and the uncontrolled distribution of both drugs in interstate commerce. * * *

For the above reasons and as "an urgent and necessary act if the American Government was to appear at Shanghai with fairly clean hands" (p. 54), as a result of the researches and recommendations mentioned above, a bill was drafted based on the investigations of the Opium Commission, aimed absolutely to prohibit the importation of smoking opium and entitled "An act to prohibit the importation and use of opium for other than medicinal purposes." This bill, which ultimately became the Act of February 9, 1909 (35 Stat. 614), being the Act now in question, was explained by Mr. Payne, who stated in reporting it from the Committee on Ways and Means in the House of Representatives, as follows (Cong. Rec., vol. 43, pt. 2, pp. 1681–1683):

The object of the bill is to prohibit the importation of opium prepared for smoking, or smoking opium. The language goes to the importation of all opium, with a proviso that opium for medicinal purposes may be imported under rules and regulations prescribed by the Secretary of the Treasury and subject to the duties provided by law. The second section is redrafted from section 3082 of the Revised Statutes, which provides punishment for knowingly or fraudulently disobeying the laws in reference to the importation of articles in general, applying that section to the importation of opium into the United States. That law was passed in 1799, and was reenacted and amended in 1866 and in 1876, and has been frequently construed by the courts and its meaning fully ascertained and its constitutionality also upheld.

(4) In accord with conventions adopted at the first International Opium Commission in 1909, and at the second International Opium Commission in 1912, Congress enacted the Opium Act of January 17, 1914, which, while extending and perfecting the prior Act of 1909, was substantially the same in principle. This Act of 1914 was enacted in direct fulfillment of an international obligation. The two acts should therefore be, to a certain extent, considered together and as parts of a single scheme of legislation, in passing upon their constitutionality.

A second International Opium Conference was held at The Hague December 1, 1911, to January 23, 1912. (See message of President Taft May 31, 1912, Senate Doc. No. 733, 62d Cong., 2d sess.) It was called at the initiative of the United States by letter from the

State Department, September 1, 1909, and was participated in by the United States, China, France, Germany, Great Britain, Italy, Japan, the Netherlands, Persia, Portugal, Russia, and Siam. A convention was adopted signed by all the powers, regulating the whole subject of import, export, manufacture, etc., of crude and prepared opium. Of this, the Report of the American delegates (Senate Doc. No. 733, *supra*, p. 19) says:

> Chapter II of the convention is of striking importance, as it provides for the obliteration in a short time of the manufacture, exportation, importation, and use of opium for smoking purposes, and, in the meantime, for the confining of such manufacture and use to territories where such manufacture and use now obtain by totally forbidding the export of this form of opium to countries which have prohibited its entry and use or to countries which propose in the future to prohibit its entry and use.
>
> The first paragraph of Chapter II defines the substance known as opium prepared for smoking, and by article 6 the contracting powers pledge themselves to take measures for the control, and ultimately effective suppression of the manufacture, domestic traffic in, and use of this form of opium.
>
> When it is recalled that not 10 years ago there was a large and influential body of public officials and others here and abroad who saw no harm, economic, moral, or otherwise, to oriental peoples in opium smoking, the im-

portance of article 6 will be recognized. It marks the right-about of such opinion, and a recognition by the Governments and peoples concerned that the opium-smoking vice is generally degrading beyond all benefits to revenue that may accrue from the manufacture, importation, exportation, and use of this form of opium, and a determination on the part of those Governments and peoples to bring the vice to a speedy conclusion.

By article 7 the contracting powers pledge themselves to prohibit not only the importation of the smokable form of opium, but also its exportation—thus conforming to one of the principles embraced by the opium-exclusion act of February 9, 1909, and the proposed amendment thereto.

In consequence of the above and to fulfill its international treaty obligation, Congress has enacted the Act of January 17, 1914 (Public, No. 46, 63d Cong., 1st sess.), also another Act of January 17, 1914 (Public, No. 4, 63d Cong., 1st sess., 2d sess.), and the recent Act of December 17, 1914 (Public, No. 223, 63d Cong., 2d sess.). (See, in reference to these acts, House Report No. 23, House Report No. 24, Senate Report No. 132, 63d Cong., 1st sess.)

THE ARGUMENT.

ANSWER TO POINT I OF PLAINTIFFS IN ERROR'S BRIEF. (pp. 16–45.)

I. Section 2 of the Opium Exclusion Act of 1909 is drafted from and is practically word for word identical with section 3082 of the Revised Statutes, which has

been frequently considered by this Court and which has always been accepted without question as constitutional.

We have it upon the authority of the late Sereno E. Payne that the bill, which was enacted into law as the act of February 9, 1909, was drafted by the former Secretary of State, Elihu Root, and that the second section was redrafted from section 3082 of the Revised Statutes. (Cong. Rec., vol. 43, pt. 2, p. 1681.) This is confirmed by comparison of the two Acts.

Revised Statutes, section 3082.—If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any *merchandise,*	*Act of February 9, 1909, section 2.*—If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof
contrary to law, *or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise*	contrary to law, *or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative*
after importation, knowing the same to have been imported contrary to law, such merchandise	*thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative*
shall be forfeited	*thereof shall be forfeited and shall be destroyed,*
and the offender shall be	and the offender shall be

fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods,	fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof,
such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury.	such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury.

The two acts are *identical* except that in the Opium Act the words "opium or preparation or derivative thereof" have been substituted for the word "merchandise," as the same occurs in Revised Statutes, section 3082, and the words "and shall be destroyed" have been inserted after the word "forfeited."

Section 3082 of the Revised Statutes was enacted in its present form in 1866 (14 Stat., p. 179, c. 201, sec. 4, act of July 18, 1866, "An act to prevent smuggling and for other purposes"). This section has been the subject of frequent consideration by this Court and lower Federal courts, and its constitutionality has never been questioned.

The particular clause relating to persons who "receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after transportation knowing the same to have been imported contrary to law," has been assumed to be valid in the following criminal cases based upon such clause:

United States v. *Thomas* (1870), 4 Ben. 370.

United States v. *Fifty-Three Boxes*, etc. (1870) 2 Bond. 354.

United States v. *Landsberg* (1870), 14 Fed. Cas. No. 8041.

United States v. *Claflin* (1878), 13 Blatchf. 178.

United States v. *Kee Ho* (1887), 33 Fed. 333.

United States v. *Sauer* (1896), 73 Fed. 671, 676.

Dunbar v. *United States* (1895), 156 U. S. 185, 198:

> This instruction, it must be borne in mind, is given in reference to that count in the indictment which charges the defendant with facilitating the transportation of the opium and not those which charge him with being himself the party who was guilty of smuggling. If he knowingly permits the appropriation of the proceeds of the smuggled opium to his own benefit, either in the payment of his drafts or in increasing the amount of his account at the bank, *he is helping to make successful the unlawful venture*, and certainly those facts would be inconsistent with the idea of his entire innocence in respect to the matter.

Reagan v. *United States* (1895), 157 U. S. 301.

Amado v. *United States* (1904), 195 U. S. 172.

And in the following forfeiture cases based on said clause:

United States v. *Ninety-Five Boxes, etc.* (1874), Fed. Cas. No. 15891.

United States v. *Lot of Jewelry* (1894), 59 Fed. 684.

United States v. *A Lot of Precious Stones* (1905), 134 Fed. 61.

And in the following criminal cases relating in general to the section:

United States v. *Merriam* (1871), Fed. Cas. No. 15759.

Keck v. *United States* (1899), 172 U. S. 434, in which the first count of the indictment was based on section 3082, which section the court must have assumed to be valid, as it discussed (on p. 437) the requirements thereunder.

United States v. *Chesbrough* (1910), 176 Fed. 778.

Rogers v. *United States* (1910), 180 Fed. 54.

United States v. *Ah Fook* (1910), 183 Fed. 33.

And in the following forfeiture cases relating in general to the section:

The Ariel and Cargo (1867), 1 Haskell 65, 77.

Stockwell v. *United States* (1871), 13 Wall. 531.

United States v. *Jordan* (1876), 2 Lowell 537.

United States v. *Ninety Demijohns, etc.* (1880), 8 Fed. 485, 487.

United States v. *Lot of Jewelry* (1875), 13 Blatchf. 60, 65.

United States v. *Claflin* (1878), 97 U. S. 546.

Von Cotzhausen v. *Nazro* (1879), 15 Fed. 891.—Affirmed (1882), 107 U. S. 215.

Friedenstein v. *United States* (1888), 125 U. S. 224, 233.

United States v. *One Pearl Necklace* (1900), 105 Fed. 357.

United States v. *One Pearl Necklace* (1901), 111 Fed. 164.

United States v. *Five Pieces of Tapestry* (1902), 114 Fed. 496.

Dodge v. *United States* (1904), 131 Fed. 849.

One Pearl Chain v. *United States* (1903), 123 Fed. 371.

United States v. *One Pearl Chain* (1904), 139 Fed. 510.

United States v. *One Pearl Chain* (1905), 139 Fed. 513.

United States v. *Fifty Waltham Watch Movements* (1905), 139 Fed. 291.

United States v. *646 Half Boxes of Figs* (1908) 164 Fed. 778, 780.

Section 4 of the Act of July 18, 1866, above quoted (R. S. 3082), was an extension of section 69 of the Customs Act of March 2, 1799 (1 Stat. 678, c. 22), which reads as follows:

> SEC. 69. And be it further enacted, that all goods, wares or merchandise which shall be seized by virtue of this act, shall be put into, and remain in the custody of the collector, or such other person as he shall appoint for that purpose, until such proceedings shall be had

as by this act are required, to ascertain whether the same have been forfeited, or not; and if it shall be adjudged that they are not forfeited, they shall be forthwith restored to the owner or owners, claimant or claimants thereof; *and if any person or persons shall conceal or buy any goods, wares or merchandise, knowing them to be liable to seizure by this act, such person or persons shall on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares or merchandise so concealed or purchased.*

And of the Act of March 3, 1823 (3 Stat. 781):

SEC. 2. And be it further enacted, that if any person or persons shall *receive, conceal, or buy, any goods, wares, or merchandise, knowing them to have been illegally imported into the United States, and liable to seizure by virtue of any act in relation to the revenue,* such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares, or merchandise, so received, concealed, or purchased.

These two Acts were assumed to be valid in cases decided under them as follows:

United States v. *Farnsworth* (1815), 1 Mason 1.

Clark et al v. *Protection Ins. Co.* (1840), 1 Story 109, 122.

Ex parte Hoyt (1839), 13 Peters 279.

Walsh v. *United States* (1847), Fed. Cas. No. 17116.

Stockwell v. *United States* (1871), 13 Wall. 531.

It thus appears that for 100 years the power of Congress to compel persons who knowingly receive, conceal, etc., goods liable to seizure—i. e., unlawfully imported—to forfeit and pay double their value has been enforced by the courts; and for 50 years the power of Congress to constitute it a crime for a person to receive, conceal, etc., goods unlawfully imported, having knowledge of such unlawful importation, has been enforced by the courts.

It is confidently submitted that this Court will not now, after so long-continued assumption by the courts of the constitutionality of such provisions, decide that Revised Statutes, section 3082, is unconstitutional.

But if Revised Statutes, section 3082, is *constitutional*, then, clearly, the Opium Act of 1909, section 2, must be likewise constitutional, for their provisions are identical.

If, as has been conceded for 50 years, Congress can make a given action a crime when committed in furtherance of the importation of goods in an illegal manner, *a fortiori* it can make the same action a crime when committed in furtherance of an importation of goods which is absolutely prohibited. The purpose of such legislation as the Act of 1823 and the Act of 1866 is well stated in *Stockwell* v. *United States* (1871), 13 Wall. 531, pp. 546, 547, 551:

> When foreign merchandise, subject to duties, is imported into the country, the act of importation imposes upon the importer the obliga-

tion to pay the legal charges. Besides this, the goods themselves, if the duties be not paid, are subject to seizure and appropriation by the Government. In a very important sense they become the property of the Government. Every act, therefore, which interferes with the right of the Government to seize and appropriate the property which has been forfeited to it, or which may hinder the exercise of its right to seize and appropriate such property, is a wrong to property rights, and is a fit subject for indemnity. Now, it is against interference with the right of the Government to seize and appropriate to its own use property illegally imported that the statute of 1823 was aimed. It was to secure indemnity for a wrong to rights of property. The instant that goods are illegally imported, the instant that they pass through the custom-house without the payment of duties, the right of the Government to seize and appropriate them becomes perfect. *If any person receives them, knowing them to have been illegally imported, or conceals them, or buys them, his act necessarily embarrasses, if it does not defeat altogether the possibility of the Government's availing itself of its right and securing the property. * * * The act of abstracting goods illegally imported, receiving, concealing, or buying them, interposes difficulties in the way of a Government seizure, and impairs, therefore, the value of the Government right.* * * * (pp. 546–547.)

It is next contended that section second of the act of 1823 can not be construed to apply

> to the illegal importers themselves. As it extends only to acts done after the illegal importation and requires knowledge of its illegality, it is argued that it aims rather at accessories after the fact. We think, however, it embraces both. If it does not, then greater liabilities are laid on the accessory than on the principal. The mischief at which the act aimed was, as we have seen, embarrassing the right of the Government to seize the forfeited goods. That may be done as well by importers as others. They may receive the goods or conceal them, and the wrong to the Government is precisely the same, whether the concealment is by them or by others who were not the importers. It certainly would be most strange if the accessory to a wrongful act were held responsible therefor when the principal goes free. As was said in *Graham* v. *Pocock*, the question who is liable for receiving, concealing, or buying the shingles is a question to be determined irrespective of the inquiry who is the principal and who the accessory. * * * (pp. 550–551.)

The words "imported contrary to law" as used in Revised Statutes, section 3082, may refer to goods imported in violation of any statute and are not confined to goods imported merely in violation of the original Act of 1866. See *United States* v. *Thomas* (1870), 4 Ben., 370.

Therefore the penal provisions of section 3082 many apply to importations in violation of many other prohibitory statutes. If this Court shall now hold

such section to be unconstitutional so far as affects the receiving, concealing, etc., of forbidden imports, it may render unenforceable to a large degree many of these other prohibitory statutes of great importance to the national welfare.

Copyrighted books: Act of March 3, 1891, c. 565, sec. 3 (26 Stat. 1107).

Fraudulent trade-marked articles: Act of July 24, 1897, c. 11, sec. 11 (30 Stat. 207).

White phosphorus matches: Act of April 9, 1912, c. 75, sec. 10 (37 Stat. 83).

Prize fight films: Act of July 31, 1912, c. 263, sec. 1 (37 Stat. 241).

Nursery stock: Act of August 20, 1912, c. 308, sec. 1 (37 Stat. 315).

Convict-made goods: Act of October 3, 1913, c. 16, sec. IV, par. H, subsec. 2 (38 Stat. 195).

Aigrettes: Act of October 3, 1913, c. 16, item 347 (38 Stat. 148).

Obscene books, etc.: Act of October, 1913, c. 16, par. G, subsecs. 1, 2 (38 Stat. 194).

Neat cattle: Act of October 3, 1913, c. 16, par. H (38 Stat. 195).

Particular notice should be given in this connection to the act of August 24, 1912, c. 382 (37 Stat. 507), forbidding importation of adulterated grain and seeds, section 4 of which provides as follows:

That any person or persons who shall knowingly violate the provisions of this act shall be deemed guilty of a misdemeanor and shall pay a fine of not exceeding five hundred dollars and not less than two hundred dollars:

Provided, That any person or persons who shall knowingly sell for seeding purposes seeds or grain which were imported under the provisions of this Act for the purpose of manufacture shall be deemed guilty of a violation of this act.

It is evident that there is no distinction between the italicized portion of this act and the part of the Opium Act the constitutionality of which the plaintiff in error contests.

For other examples of statutory prohibition of imports see:

Act of March 2, 1799, c. 22, secs. 23, 92 (1 Stat. 644, 697).

The Non-intercourse Acts of April 18, 1806 (2 Stat. 379), and February 27, 1808 (2 Stat. 469).

Act of August 30, 1842, c. 270, sec. 28 (4 Stat. 566); act of March 2, 1857, c. 63 (4 Stat. 168), prescribing forfeiture and destruction of indecent prints imported.

Act of February 25, 1862, c. 33, sec. 7 (12 Stat. 347).

Acts of December 18, 1865, c. 2, and March 6, 1866, c. 12 (14 Stat. 1 and 3).

Act of July 28, 1866, c. 298, sec. 1 (14 Stat. 328).

Act. of July 14, 1870, c. 255, sec. 21 (16 Stat. 263).

Act of March 3, 1871, c. 125 (16 Stat. 580).

Act of March 3, 1873, c. 258, sec. 3 (17 Stat. 599).

Act of March 2, 1883, c. 64 (22 Stat. 451).

Act of March 3, 1883, c. 121, sec. 6 (22 Stat. 489).

Act of February 28, 1887, c. 288 (24 Stat. 434).

Act of March 3, 1887, c. 339 (24 Stat. 476).

II. The Opium Exclusion Act of 1909 is within the power conferred upon Congress by Article I, section 8, of the Constitution to regulate commerce with foreign nations.

It is admitted and indeed thoroughly established by the decisions of this Court that the power to regulate commerce with foreign nations includes the power to prohibit the importation into the United States of any article or articles which Congress may see fit to exclude.

The Abby Dodge (1912), 223 U. S. 166, 176.
United States v. *Marigold* (1850), 9 How. 560, 566.

In *Buttfield* v. *Stranahan* (1904), 192 U. S. 470, the Court said (p. 492):

> Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude mer-

> chandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines and chemicals entitled to admission into the United States and excluding such as did not equal the standards adopted. (9 Stat. 237; Rev. Stat. sec. 2933 et seq.)

(See also authorities cited in Government's brief in the *Lottery* case (1903), 188 U. S. 321, 341–343.)

Power to regulate (or prohibit) commerce in certain directions may be exercised not merely for the benefit of commerce itself but for the general welfare of the Nation.

> *United States* v. *Marigold* (1850) 9 How. 560, 566: * * * it can scarcely, at this day, be open to doubt, that every subject, falling within the legitimate sphere of commercial regulation, may be partially or wholly excluded, when either measure *shall be demanded by the safety or by the important interests of the entire nation.*

To the same effect see *United States* v. *The William* (1808), 28 Fed. Cas. 614, case No. 16700, at p. 621.

Having, then, the undoubted power under the Commerce Clause to forbid the entry of merchandise into the United States, Congress may "make all laws which shall be necessary and proper for carrying into execution" the foregoing power. (Constitution, art. 1, sec. 8, c. 18.) By settled construction, the words "necessary and proper" are not limited to such measures as are absolutely and in-

dispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are plainly adapted to the end to be accomplished, which are not prohibited and which are consistent with the letter and spirit of the Constitution, and which in the judgment of Congress will accomplish that end.

What, then, is the end which Congress had in view in passing the Opium Exclusion Act of 1909? Without hesitation we can answer that the primary purpose of the Act was *to prevent the importation of opium and its derivatives into this country.* Everything else in the Act is incidental to and in pursuance of this main purpose. In the House of Representatives, Mr. Payne, in reporting the bill from the Ways and Means Committee, said:

> The object of the bill is *to prohibit the importation of opium* prepared for smoking, or smoking opium. The language goes to the importation of all opium, with a proviso that opium for medicinal purposes may be imported under rules and regulations prescribed by the Secretary of the Treasury. The second section is redrafted from section 3082 of the Revised Statutes, which provides punishment for knowingly or fraudulently disobeying the laws in reference to the *importation* of articles in general, applying that section to the *importation of opium* into the United States. (Cong. Rec., vol. 43, pt. 2, p. 1681, 60th Cong., 2d sess., Feb. 1, 1909.)

See also *United States* v. *Caminata* (1912) 194 Fed. 903, in which, on an indictment under the Opium Act of 1909, the Court said (adopting the language of the United States Attorney's brief):

> This act is not a customs law designed to avoid fraud upon the revenue, but is purely a prohibitory statute, absolutely forbidding the bringing into this country from abroad of an article deemed by Congress to be injurious to the health and morals of our people. The act has no relation to the customs system, and the fine distinctions which are discussed in the customs cases, relating to the time when the obligation to pay customs duties first accrues, have no bearing whatever upon a case of this character (p. 904).

The Government maintains that the contested portion of section 2 of the Act is a proper and appropriate means for enforcing the prohibition of opium importation. Without it, the effective prohibition which the Act seeks to insure would be difficult, if not impossible. The contested provisions are more than appropriate; they are well-nigh *indispensable*. The reason for this is found in the nature of the opium trade itself. It is a well-known fact that the traffic in opium is carried on with the utmost secrecy and that every year large quantities of the drug have been smuggled into the country in spite of the vigilance of the customs officials. It is a matter of common knowledge that opium is not produced in this country. The raw product comes almost exclusively from China. (See Cong. Rec., vol. 43, p. 1681 et seq.; message of

President Taft upon the opium problem, 61st Cong., 2d sess., Senate Doc. 377.) Owing to the ease with which opium may be hidden and smuggled into the country undetected, its importation can not be effectively stopped unless those who deal in such smuggled opium after its importation can be reached and punished by the Government. A large amount of opium has been brought into the country by being smuggled over the Mexican border by land. (See Senate Doc. 377, *supra*.) If those who receive unlawfully imported opium *knowing it to be unlawfully imported* (as provided in the Act), become, by taking such opium, liable to punishment, the effect will be to discourage importation, for the risks of those who buy from the importers will be greatly increased. When importers find that they are unable to dispose of the opium they have unlawfully brought in, they will cease to attempt importation of that from which a profit can no longer be made.

Under the contested portion of section 2 of the Opium Act *knowledge of the illegal importation* is made an essential element of the crime.

> *United States* v. *Sauer* (1896), 73 Fed. 671, 676.
>
> Section 3082 of the Revised Statutes does not make the mere receipt or concealment of smuggled goods an offense. There must be, on the part of the person receiving or concealing the goods after their importation, knowledge of their illegal importation.

The requirement of *knowledge* furnishes clear evidence that the fundamental and single purpose of the

Act was effectively to prevent the importation of opium. He who receives opium or does with opium any of the acts prohibited must ascertain at his peril whether such opium was imported contrary to law. Opium is not subject to forfeiture and destruction unless it is in the hands of one who has fraudulently or knowingly imported it, or of one who has received or concealed it knowing it to have been imported contrary to law.

The importation of smoking opium being absolutely illegal, its presence or continuance in the United States after being so imported is illegal. Congress, by the statute itself, gave to the Government the right to forfeit and destroy such opium wherever it should be found.

Congress has ample power to authorize the destruction of articles which it has prohibited as articles of commerce, and such destruction is an appropriate means for enforcing the prohibition.

> *Hipolite Egg Co.* v. *United States* (1911), 220 U. S. 45.
>
> *Buttfield* v. *Stranahan* (1904), 192 U. S. 470, 497.
>
> *Sentell* v. *New Orleans, etc., R. Co.* (1897), 166 U. S. 698, 705.
>
> *North American Cold Storage Co.* v. *Chicago* (1908), 211 U. S. 306, 315.
>
> *Lawton* v. *Steele* (1894), 152 U. S. 133.
>
> *29 Opin. Atty. Gen. 603* (1912), and cases cited.

And it is not essential that such article, when destroyed, should be in the original package.

McDermott v. *Wisconsin* (1913), 228 U. S. 115. See *infra*.

The power existing to forbid the importation of opium, "the right to exercise that power carries with it the authority to do those things which are incidental to the power itself, or which are plainly necessary to make effective the principal authority when exerted," or which have "reasonable relation to this end." (*B. & O. R. R. Co.* v. *Int. Com. Comm.* (1911), 221 U. S. p. 619; *Lewis Publishing Co.* v. *Morgan* (1913), 229 U. S., 314.) Hence, Congress could make criminal any act having a direct or reasonably closely related tendency to interfere with the Government's right to seize and destroy such opium. Clearly, the selling or concealing or facilitating the transport of the forbidden article, with knowledge of its illegal importation, had such tendency to place obstacles in the way of the Government's right to seize and to make more remote the chances of sucessful detection by the Government of the presence of the forbidden article.

This is the precise ground on which the constitutionality of Revised Statutes, section 3082 (Act of July 18, 1866; act of Mar. 23, 1823; Act of Mar. 2, 1799, sec. 69), has been upheld, or at least assumed, for 100 years in the numerous cases founded on those acts. See especially *Stockwell* v. *United States* (1871), 13 Wall., 531, pp. 546, 547, quoted *supra*, p. 21. (Note: The *Stockwell case* was modified in its decision by *United States* v. *Claflin* (1878), 97 U. S.,

546, but nothing in the latter decision interfered with the reasoning above quoted.)

Clearly, the relation between the object sought to be attained by Congress and the means which it provided to effectuate its objects in the Opium Act were not within the objection raised by the Court in *United States* v. *De Witt* (1873), 9 Wall., 41, in which it was said as to the disputed provisions of the act there in question:

> This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power * * * (p. 44).

The inference to be drawn from the above language is that if the consequence were NOT "too remote and too uncertain" the statute would be upheld.

This Court will not hold that the relation of the means provided by the act to the purpose of the act was so remote and uncertain as to make the act unconstitutional, except in the clearest possible case, where no other decision would be within reason.

In *Nicol* v. *Ames* (1898), 173 U. S. 509, 514–515, the court said:

> It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court

> should hold an act of the lawmaking power of the Nation to be in violation of that fundamental instrument upon which all the powers of the Government rest.

And in *Henderson Bridge Co.* v. *Henderson City* (1899), 173 U. S. 592, 615, the Court said:

> * * * an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute. * * *

The prohibition of opium importation being thus a legitimate object, and the means adopted by Congress for effecting that object appropriate, and, in fact, necessary, there can be no doubt as to the validity of section 2 of the Act under Article 1, Section 8, of the Constitution. Chief Justice Marshall said in *Brown* v. *Maryland* (1827), 12 Wheat. 419, at p. 446:

> It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value.

Substitute in this quotation for the word "authorize" the one word "*prohibit*," and in reading the word "traffic," think of the opium trade, and what could more aptly fit the precise case at bar?

The broad principles upon which it is submitted the constitutionality of this statute should be sustained, and to which we have already adverted, have

long been set above and beyond the level of argument. The cases in the Federal courts, however, involving the constitutionality of Federal statutes under the Commerce Clause, are few, compared with the vast number of decisions involving encroachment by State statutes upon the powers of Congress under the Commerce Clause.

United States v. *Coombs* (1838), 12 Pet. 72, is, however, to be especially noted. Defendant was indicted under an act of Congress approved March 3, 1825, which made it criminal for any person to steal property belonging to any vessel in distress or wrecked upon a shoal or other place within the maritime jurisdiction of the United States. He was charged with stealing from a beach upon the New York shore goods belonging to a ship which had run upon a shoal. *It was admitted that the goods when taken were above high-water mark.* It was *held* that Congress had power to pass the statute under the Commerce Clause and that the indictment was therefore good.

Justice Story, delivering the opinion of the Court, said (p. 77):

> The power to regulate commerce * * * does not stop at the mere boundary line of a State; nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. *It extends to such acts, done on land, which interfere with, obstruct or prevent the due exercise of the power to regulate commerce and navigation with foreign nations* and among the States. Any offense which thus interferes with, obstructs or prevents such commerce and

> navigation, though done on land, may be punished by Congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers. * * *
>
> It is nowhere stated, that this property, belonging to any ship or vessel, shall be in any of the enumerated places, when the offense is committed; but only that it shall be property belonging to the ship or vessel which is in distress, or wrecked, lost, stranded or cast away. *Locality, then, is attached to the ship or vessel, and not to the property plundered, stolen or destroyed.*

By analogy, we may say in the case at bar that "locality is attached" to the act of importing opium contrary to law. He, then, who receives opium, knowing of its unlawful entry, is amenable to the laws of the United States. It is true that Justice Story was speaking of acts which tended to hinder or obstruct the free course of commerce, while in the case at bar commerce, so far as concerns opium, has been prohibited. But his reasoning is nevertheless applicable. For if Congress, where its will is that commerce shall be unobstructed, may prohibit the doing of acts within the borders of a State which tend to impede commerce (even though the very same acts may be subject to prohibition by the State under its police power), then equally must it be true that where Congress, in the exercise of its undoubted powers under the Commerce Clause, has prohibited commerce in a particular article the incidental im-

plied power exists to punish acts which will impede or obstruct the *prohibition* which Congress would see enforced.

III. Congress having power to make criminal the importation of an article, may provide for the punishment as an accessory of one who receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of an article after importation, knowing the same to have been imported contrary to law.

1. *Hawkins, Pleas of the Crown*, 232, 234, 235:

> Forasmuch as thieves and robbers are much encouraged to commit offences, because a great number of persons make it their trade and business to deal in the buying of stolen goods, it is enacted by 3 Will. and Mar., c. 9. f. 4. and 5. Ann. c. 31. f. 5. "that whoever shall buy or receive any goods or chattels, (1) that shall be feloniously taken or stolen from any other person, *knowing the same to be stolen*, shall be taken and deemed an accessory to such felony after the fact." * * *
>
> And it is also enacted by 29 Geo. 2, 30, "that every person who shall buy or receive any lead, iron, copper, brass, bell metal, or solder, *knowing the same to be unlawfully come by*," etc. * * *
>
> And it is further enacted by 2 Geo. 3, c. 28, "that whoever shall buy or receive any part of the cargo or loading of, or any goods, stores, or things of, or belonging to any ship or vessel in the River Thames, *knowing the same to be stolen, or unlawfully come by*," etc. * * *

> And it is also enacted by 10 Geo. 3, c. 48, "that every person who shall buy, or receive any stolen jewel, or jewels, or any stolen gold or silver plate, watch or watches, *knowing the same to have been stolen*," * * *
>
> And it is further enacted by 21 Geo. 3, c. 69, "that every person who shall buy, or receive any pewter pot, or other vessel, or any pewter in any form or shape whatever, *knowing the same to be stolen or unlawfully come by*," etc. * * *

These quotations from English statutes have been set forth to show their striking similarity to the language of the Opium Exclusion Act.

At common law a man did not become an accessory by receiving stolen goods, but by receiving and giving aid to the *thief*.

> 1. *Hale, Pleas of the Crown*, 619: If A hath his goods stolen by B, and C, knowing they were stolen, receives them, this simply of itself makes not an accessory, and therefore it hath been often ruled that to say S *hath received stolen goods knowing them to be stolen*, is not actionable, because it imports not felony, but only a trespass or misdemeanor, punishable by fine and imprisonment, for the indictment of an accessory *after*, is that he received and maintained *the thief* not *the goods*.

But, as shown by the statute (3 Will. and Mar.) quoted above, *the receiver of stolen goods was made by statute an accessory after the fact*. Statutes making criminal the receipt of stolen goods with knowledge that they were stolen are now practically universal.

They establish the common view that one who knowingly receives stolen goods *ipso facto* creates a criminal relationship between himself and the original act of theft.

In all of the States, the receipt of stolen goods is made a substantive offense punishable apart from the prosecution of the original thief. But the reason for this is not that the legislatures considered that there was no relation between the receipt of stolen goods and the original theft, but because of the peculiar common-law rule that an *accessory* could not be punished until after the conviction of the *principal.* Consequently the receipt of stolen goods has by all the statutes been made a distinct offense punishable whether or not the original thief has been convicted, and many of the statutes specifically provide that a prior conviction of the principal thief shall not be necessary for a conviction for receiving the stolen goods. A full list of the State statutes is given in the footnote.[1]

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[1] *Alabama:* Code (1907), secs. 7328, 7329; embezzled property, secs. 6841, 6842.
Arizona: Penal Code, secs. 493, 494.
Arkansas: Rev. Stat. (1874), secs. 1359, 1360.
California: Penal Code (1906), secs. 496, 497; same as Arizona statute.
Colorado: Statutes annotated (1911), sec. 1686.
Connecticut: Gen. Stat. (Revision of 1902), sec. 1210.
Delaware: R. S. 1852 (as amended to 1892), p. 937.
Florida: Gen. Stat. (1906), sec. 3304.
Georgia: Penal Code (1910), secs. 168, 169—Accessory.
Hawaii: Penal Laws of the Hawaiian Islands (1897), ch. 20, secs. 170–176.
Idaho: Rev. Codes (1908), secs. 7057, 7058.
Illinois: Criminal Code, secs. 239–241, incl. (Rev. St. 1913, p. 852).
Indiana: Burns Annot. Ind. Stat. (1908), secs. 2273, 2274.
Iowa: Annot. Code (1897), secs. 4845, 4848.
Kansas: Gen. Stat. (1909), secs. 2582, 2583.

The statutes in Georgia and Pennsylvania are particularly significant.[2] In Georgia, the receiver of

Kentucky: Statutes (Carroll, 1909), sec. 1199.

Louisiana: Rev. Laws (Wolff) 1904, sec. 832—Receiving goods and receiving thief both provided for in same section.

Maine: Rev. Stat. 1904, ch. 121, sec. 12.

Maryland: Code (1904), art. 27, sec. 371.

Massachusetts: Rev. Stat. (1902), ch. 208, secs. 51, 52, 53.

Michigan: Howell's Annot. Stat. (1913), secs. 14605, 14608.

Minnesota: Rev. Laws 1905, sec. 5093.

Mississippi: Code of 1906, secs. 1259, 1514.

Missouri: R. S. 1909, secs. 4554, 4555.

Montana: Rev. Codes 1907; Penal Code, sec. 8662.

Nebraska: (Embezzled property) Cobbey's Anno. Stat. (1909), sec. 2200; (stolen property) id., secs. 2188, 2189, 2190, 2191, 2195.

Nevada: Rev. Laws (1902), sec. 6648.

New Hampshire: Public Statutes (1901), ch. 275, p. 828, sec. 13.

New Jersey: Comp. Stat. (1910), p. 1795, sec. 166; P. L. 1906, p. 431—Harboring thief in same section.

New Mexico: Compiled Laws 1897, secs. 1117, 1118, 1119.

New York: Penal Law, sec. 1308, 1309.

North Carolina: Revisal of 1905, sec. 3507.

North Dakota: Rev. Codes 1905; Penal Code, secs. 9199, 9201.

Ohio: Page & Adams Annot. Code 1910, sec. 12450.

Oklahoma: Rev. Laws (1910), sec. 2664.

Oregon: Bell & Cotton Annot. Codes and Stat. (1901), sec. 1809.

Pennsylvania: Purdon's Digest 1905, p. 1006, par. 446, 447—Felony in Pennsylvania; See also act of Apr. 23, 1909, sec. 1, P. L. 159 (Purdon's Digest, Supplement 1909, p. 5378).

Rhode Island: Gen. Laws, Revision of 1909, ch. 345, sec. 13.

South Carolina: Code (1912); Criminal Code, sec. 204.

South Dakota: Comp. Laws 1913, p. 633; Penal Code, sec. 618.

Tennessee: Code 4683 (1873–1895).

Texas: Penal Code, art. 878, act of Mar. 20, 1897.

Utah: Rev. Stat. 1898; Penal Code, secs. 4367, 4368.

Vermont: Pub. Stat. (1906), sec. 5763.

Virginia: Code (1904), sec. 3714.

Washington: Pierce's Code (1912), Tit. 135, sec. 1563.

West Virginia: Code 1913, sec. 5209.

Wisconsin: Statutes 1911, sec. 4417, ch. 182.

Wyoming: Comp. Stat. 1910, secs. 5831, 6228.

[2] *Georgia, Penal Code* (1910):

SEC. 168. **Receiving stolen goods:** If any person shall buy or receive any goods, chattels, money, or other effects that shall have been stolen or feloniously taken from another, knowing the same to be stolen or feloniously

stolen goods is punished as an accessory to the original theft, and in Pennsylvania it is provided that prosecution, conviction, and sentence of receivers of stolen goods shall exempt them from being prosecuted as accessories after the fact, in case the principal shall be afterwards convicted, the inference being that in the absence of this provision they *would be* punishable as *accessories after the fact.*

The fundamental basis for such a statute is the enforcement of the public policy against stealing. To prevent stealing is their underlying object. For if a man could without subjecting himself to criminal prosecution knowingly receive stolen property, thieves and burglars would ply their trade with far more assurance of gain. The effect of such statutes is to discourage larceny and kindred crimes by closing the markets for the disposition of stolen goods.

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taken, such person shall be an accessory after the fact, and shall receive the same punishment as would be inflicted on the person convicted of having stolen or feloniously taken the property.

SEC. 169. **If principal can not be taken:** If the principal thief can not be taken, so as to be prosecuted, the person buying or receiving any goods, chattels, money, or effects stolen or feloniously taken by such principal thief, knowing the same to be stolen or feloniously taken, shall be punished as prescribed in the preceding section; and a conviction under this section shall be a bar to any prosecution under the preceding section.

Pennsylvania, Purdon's Digest (1905), p. 1006:

446. If any person shall buy or receive (*a*) any goods, chattels, moneys, or securities, or any other matter or thing, the stealing of which is made larceny by any law of this Commonwealth; (*b*) knowing the same to be stolen or feloniously taken; (*c*) such person shall be guilty of felony, and, on conviction, (*d*) suffer the like pains and penalties (*e*) which are by law imposed upon the person who shall have actually stolen or feloniously carried away the same (*f*).

447. It may and shall be lawful to prosecute and punish all buyers and receivers, as well before as after the principal felon shall be taken and convicted, and whether he be amenable to justice or otherwise; which prosecution, conviction, and sentence of said receivers shall exempt them from being prosecuted as accessories after the fact, in case the principal felon shall be afterwards convicted.

The Government asserts that the Opium Exclusion Act of 1909 had the same end in view—to bring about the effective prohibition of the importation of opium by closing the avenues of disposition.

The analogy above pointed out is specifically asserted as the essence of the crime established by Congress in the Act of 1866 and Rev. Stat., sec. 3082, in *United States* v. *Claflin* (1875), 13 Blatchf. 178, 182, where the indictment charged concealing, etc., goods knowing the same to have been imported contrary to law:

> I pass, therefore, to consider the next objection—that the illegality in the importation of these cases is not properly stated. In support of this objection, the proposition is ad-advanced, that an indictment for buying goods which have been brought into the United States contrary to law must set out the offence committed in the original importation, with the same particularity of time, place, and circumstances that would be required in an indictment for the original offence. Such a proposition can not be maintained. *The offence of knowingly buying smuggled goods is similar in character to that of receiving stolen goods*, so much so that it has been conceded that the rule applied to indictments for receiving stolen goods may be properly applied to this indictment. The concession is fatal to the objection under consideration. The rule applying to indictments for receiving stolen goods is thus given by Roscoe: "It is not necessary to state in the indictment the

> name of the principal felon, and the practice is merely to state the goods to have been before then feloniously stolen." (Roscoe's criminal Ev. 885; see, also, 2 Wharton, secs. 1899, 1900.) * * *

See to the same effect quotation from *Stockwell v. United States, supra* p. 22.

The power of Congress to declare that the receipt, purchase, concealment, or sale of goods unlawfully imported, *knowing that they have been brought in contrary to law,* shall constitute an offense against the United States is closely connected with the offense of unlawfully importing. In this respect the analogy of statutes making the receiver of stolen goods an accessory after the fact is sufficient to indicate that the act of receiving, etc., unlawfully imported goods with knowledge of the illegal importation is not so far removed and remote from the illegal importation itself as to be beyond the power of Congress to punish.

IV. Cases Urged by Plaintiffs in Error to Conflict with the Above Contentions.

No case cited by the plaintiffs in error in their brief to support their contention that section 2 of the Opium Act of 1909 is unconstitutional is direct authority for such proposition. The general principle running through all the cases, that Congress and the States are each supreme in their several spheres, is undisputed. But in not one of them was the application of that principle to the facts

such as to cast any shadow upon the constitutionality of the act now under consideration.

The case nearest in point cited by the plaintiffs in error is *United States* v. *Gould* (1860), 25 Fed. Cases 1375, case No. 15239. There the defendant was indicted under section 7 of the act of Congress of April 20, 1818 (3 Stat., 450), which made it unlawful for any person to "hold, purchase, sell, or otherwise dispose of any negro * * * for a slave, etc., * * * who shall have been imported or brought, in any way, from any foreign kingdom, etc., * * * into any port or place within the jurisdiction of the United States." The District Court held that although Congress had power to prohibit the importation of negroes for purposes of slavery, Congress could not make it a crime to hold a negro as a slave where there was no participation in the original importation and the negro had become mingled with the population of the State.

This case is distinguishable from the case at bar in two important particulars:

1. The statute there involved did not make *knowledge of the illegal importation an element of* the crime.

2. It appears that the defendant in fact had no knowledge of the illegal importation of the particular negro whom he was charged with holding for purposes of slavery. This is clearly stated on page 1376, where the Court says:

> It is conceded by the district attorney of the United States that the indictment is under the 7th and not the 6th section of the act of

> April 20, 1818, and that he does not charge, and does not expect to prove, that Mr. Gould in any manner participated in or had any knowledge of the illegal importation.

Keller v. *United States* (1909), 213 U. S. 138, is also relied upon by the plaintiffs in error. This case involved the act of February 20, 1907 (34 Stat., 898, c. 1134), part of which made it a felony to harbor for purposes of prostitution an alien woman within three years after her entry into the United States. It was *held* that the act was unconstitutional as to one harboring such a prostitute without knowledge of her alienage or participation in her coming into the United States.

This case is also to be distinguished upon much the same grounds as the *Gould* case. Under the Act of 1907, *knowledge* by the defendant, that the woman harbored as a prostitute was an alien who had come into the country within three years, was *not* made an element of the crime. Therein lay its fatal defect. *There was nothing to connect the offense with the entry of the alien*, as to which it was admitted Congress had full power of regulation and control.

On page 147 the Court says:

> As to the suggestion that Congress has power to punish one assisting in the importation of a prostitute, it is enough to say that the statute does not include such a charge; the indictment does not make it * * *. In view of those facts, the question of the power of Congress to punish those who assist in the

importation of a prostitute is entirely immaterial.

Mr. Justice Holmes (Justices Harlan and Moody concurring) stated, in their dissenting opinion (p. 150):

> If Congress can forbid the entry and order the subsequent deportation of professional prostitutes, it can punish those who cooperate in their fraudulent entry. If Congress has power to exclude such laborers, * * * it has the power to punish any who assist in their introduction. That was the point decided in *Lees* v. *United States*, 150 U. S. 476, 480. *The same power must exist as to co-operation in an equally unlawful stay. The indictment sets forth the facts that constitute such co-operation and need not allege the conclusion of law.*

It is submitted that the real point of difference between the majority of the Court and the dissenting judges was a divergency of opinion as to whether the statute attempted to punish "co-operation in an * * * unlawful stay," and whether the indictment did or did not set forth facts showing any such "co-operation."

The statute in the *Keller* case did not, as does the Opium Act in the case at bar, prescribe as one element of the crime the fact that the defendant should deal with the forbidden subject or the illegally imported subject "having knowledge of the illegal importation." In fact, in the *Keller* case it was not shown that the defendant had any knowledge at all that the prostitute in question had been imported illegally. Hence it could not be said that the statute

penalized "co-operation in an unlawful stay," because "co-operation" implies some voluntary action impeding the Government, while the action forbidden by the statute might be performed by the defendant in entire ignorance that he was by such performance co-operating in impeding the Government.

It is submitted that had the majority and minority of the Court in the *Keller* case agreed in their view of the purport of the statute and of the facts proved in the case, they would also have accepted the doctrine that if Congress can forbid the importation of an article, and can require forfeiture and destruction of that article after such importation, it can equally forbid any action which constitutes a reasonably direct "co-operation * * * in the unlawful stay" or presence of that article in this country, or which constitutes a reasonably direct interference with the Government right to search, out, seize, and destroy the article wherever found.

After the decision in the *Keller* case, Congress amended the White-Slave act of February 20, 1907 (34 Stat. 898, c. 1134), by an Act of March 26, 1910 (36 Stat. 264, c. 128, sec. 2), by adding the words "in pursuance of such illegal importation," so that section 3 of the act as amended read as follows:

> That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import or attempt to import into the United States, any alien for the purpose of

> prostitution or for any other immoral purpose, or whoever shall hold or attempt to hold any alien for any such purpose *in pursuance of such illegal importation*, or whoever shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, *in pursuance of such illegal importation*, any alien, shall in every such case be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars. * * *

So amended, the statute was held constitutional in *United States* v. *Krsteff* (1911), 185 Fed. 201, 203, 205:

> *It is clear that Congress has no such power, unless by apt words of the statute those dealings shall relate and have connection with some matter of importation which is made unlawful by Congress, and the matter of the unlawful importation shall be known to the party sought to be charged.*
>
> * * * The importation of an alien woman for an immoral purpose having been made unlawful by the act of February 20, 1907, and being in effect at the time the defendant brought this woman into the United States, and it having been made an offense by the amendment of March 26, 1910, to keep, maintain, control, or support in pursuance of such illegal importation, then to keep, maintain, control, or support an alien woman for an immoral purpose who had been imported unlawfully under the provisions of the act of February 20, 1907, after this amendment was in effect,

> was a matter within the power of Congress to control and regulate by statute, and Congress having so acted, then the keeping, maintaining, controlling, or supporting of an alien woman in a house for an immoral purpose in pursuance of such illegal importation after the amendment of March 26, 1910, was a violation of the act as amended, and subjected the defendant to indictment.

In other words, the White-Slave Law as amended was upheld on the precise ground now urged in behalf of the Opium Act, viz, the dealings made unlawful "relate and have some connection with some matter of importation which is made unlawful by Congress and the matter of the unlawful importation shall be known to the party sought to be charged."

In *United States* v. *Portale* (1914), 235 U. S. 27, the statute involved in the *Keller* case (34 Stat. 898, c. 1134), as amended by the act of March 26, 1910 (36 Stat. 264, c. 128, sec. 2), was considered in the Government's brief and its constitutionality was argued; but the Court in its decision did not find it necessary to consider the question.

"ORIGINAL PACKAGE" CASES NOT APPLICABLE.

Plaintiffs in error in their brief (pp. 36, et seq.) assert that the original-package doctrine laid down by the Court is authority for their contention that Congress has no constitutional power to further its object of prohibition of imports of opium by making criminal the actions in the case at bar.

The contention as phrased by plaintiffs in error in their brief is as follows:

> The court has universally held that there is a limitation to the commerce power of the Federal Government. It has been universally held, as will be shown by the original-package doctrine, that, in so far as legitimate articles of commerce are concerned, the power of the Federal Government is limited in its exercise over such articles as long as the articles remain in their original package and until they have been commingled with the general mass of the property in the State so as to lose their identity. * * * (P. 36.)
>
> The original doctrine, as expressed in this case, has been universally followed by the court. To be sure, it may be that this doctrine will be held inapplicable to articles of commerce which are contraband, and which are excluded from this country. However this may be, there is no decision, although *dicta* are found in the pure food and drug decisions, which extends the power of Congress beyond the original-package doctrine. * * * (P. 37.)

It will be noted from the above that the plaintiffs in error specifically limit the original-package doctrine to "*in so far as legitimate articles of commerce are concerned*"; and they also admit that there is no case holding that this particular doctrine necessarily applies to articles which are excluded from this country by Congress.

There is another point which is to be urged in considering the "original-package" doctrine. The doc-

trine originated with *Brown* v. *Maryland* (1827), 12 Wheat., 419.

In that case and in the cases following it, in which the original-package doctrine has been asserted, including *Vance* v. *Vandercook* (1897), 170 U. S., 438, cited by plaintiffs in error on page 36 of their brief, the Court was considering the question of the power of a State to enact legislation which would in greater or less degree *impede* the free course of interstate or foreign commerce. They were cases where Congress by its silence had indicated tacitly that commerce should be free and unobstructed. The Court was therefore in all these cases seeking to fortify the powers of the National Government against unwarranted State interference. But here the reverse situation arises. Congress has spoken. Congress has said that trade in opium shall be prohibited, and that in order to prevent the importation of this noxious substance anyone who sells it, etc., knowing its unlawful importation, shall be punished. If the State were to attempt to obstruct this policy of exclusion as enacted by Congress, it would be guilty of as clearly an unwarranted interference with the powers of Congress as were the States in the "Original Package" cases in attempting to interfere with the *freedom* of commerce.

On the other hand, where acts of Congress regulating commerce have been involved the Court has not shown a disposition to limit Congress to the same extent. This is admitted by the plaintiffs in error,

as shown by the above quotation from page 37 of their brief.

This distinction has been recognized recently by this Court in *McDermott* v. *Wisconsin* (1913), 228 U. S., 115, 136, where the Court, in speaking of the Federal pure food and drug law, and particularly of that portion of the law which authorizes the confiscation of improperly labeled articles of food remaining "unloaded, unsold, OR in original unbroken packages," says:

> The doctrine of original packages had its origin in the opinion of Chief Justice Marshall in *Brown* v. *Maryland*, already referred to. It was intended to protect the importer in the right to sell the imported goods which was the real object and purpose of importation. *To determine the time when an article passes out of interstate into State jurisdiction for the purpose of taxation is entirely different from deciding when an article which has violated a Federal prohibition becomes immune. The doctrine was not intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end.* The legislative means provided in the Federal law for its own enforcement may not be thwarted by State legislation having a direct effect to impair the effectual exercise of such means.

See also *Hipolite Egg Company* v. *United States* (1911), 220 U. S. 45, 58.

> There is here no conflict of national and State jurisdictions over property legally articles of trade. *The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State.* The question in the case, therefore, is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? *To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce.*

Plaintiffs in error (on page 39 of brief) state:

> But, as stated above, although the dicta as to the unlimited power of Congress over contraband articles, whether interstate or foreign commerce, may in some future decision be upheld by this court to be the law, yet, as previously argued, does it not touch the question here at issue—the right to punish the person merely concealing such article, without any connection or relationship with the unlawful importation being shown?

This statement assumes as true the very point on which the Court must decide this case—viz, whether the act of concealing the illegally imported article is in fact and in law an act "without any connection or relationship with the unlawful importation."

It is no objection to the Act that it seeks to punish actions which might be prohibited by State law, or that it partakes of the nature of a police regulation. As said by this Court in the recent case of *Hoke* v. *United States* (1913), 227 U. S. 308, 323, in speaking of the power of Congress to regulate commerce among the States:

> The principle established by the cases is the simple one * * * that Congress has power over transportation "among the several States"; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, *and the means may have the quality of police regulations. Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215; Cooley, Constitutional Limitations, 7th ed. 856.

There have been frequent cases in the past where the same act might be punished under either a State or a Federal law. Thus in *Fox* v. *State of Ohio* (1847), 5 How. 410, it was held that a State might punish the offense of uttering or passing false coin as a cheat or fraud practised on its citizens; while in *United States* v. *Marigold* (1850), 9 How. 560, it was held that Congress, in the exercise of its authority under the Commerce Clause and the power to punish counterfeiting might

punish the same act as an offense against the United States. See also *Moore* v. *State of Illinois* (1852), 14 How. 13; *Coleman* v. *Tennessee* (1878), 97 U. S. 509; *Grafton* v. *United States* (1907), 206 U. S. 333, 354. So, although it may be admitted that a State might, in the exercise of its police powers, prohibit the sale of opium within its borders, yet the existence of such power can in no way be asserted as a limitation upon Congress, if, in exercising its powers under the Constitution, Congress sees fit to make the same act an offense against the United States.

ANSWER TO POINT IV OF PLAINTIFFS IN ERROR'S BRIEF (pp. 58–69).

V. The Court properly refused the requested instructions, which assumed as matter of law that it is absolutely necessary for the testimony of accomplices to be corroborated, because—

First, there is no such common law rule, and the rules of evidence under the common law control in criminal actions in Federal courts.

> *Wigmore*, Evidence (1904) 3, sec. 2056: But not until the end of that century (the eighteenth) does any court seem to have acted upon such a suggestion in its directions to the jury. About that time there comes into acceptance a general practice to discourage a conviction founded solely upon the testimony of an accomplice uncorroborated.
>
> (1) But was this practice *founded on a rule of law? Never, in England.* It was recognized constantly that the judge's instruction upon this point was a mere exercise of his

common-law function of advising the jury upon the weight of the evidence, and was not a statement of *a rule of law* binding upon the jury. * * *

In the United States the same discrimination was early accepted. * * *

As a matter of common law, then, the doctrine was universally understood (except by one of two courts) as amounting to no rule of evidence, but merely to a counsel of caution given by the judge to the jury. It followed that the jury might or might not regard the caution by acquitting upon an uncorroborated accomplice's testimony; that they alone were to determine whether corroboration existed and was sufficient; and that the trial judge's omission of the caution was of itself not a ground for a new trial, being a matter solely for the trial judge's discretion.

See also:

Starkie, Evidence (1837), v. 2, p. 12.

Taylor, Evidence (1858), v. 2, p. 796.

Phillips, Evidence (1859), v. 1, p. 110.

Greenleaf, Evidence (1899), v. 1, p. 519, sec. 380.

Underhill, Criminal Evidence (1910), sec. 73, p. 127.

In *Atwood and Robbins* case (1788?), 1 Leach, C. L. 464, the defendants were convicted of conspiracy upon the testimony of an accomplice not corroborated by any material testimony. The prisoners were respited and the case referred to 12

judges as to whether such evidence was sufficient to warrant a conviction. Thereafter Mr. Justice Buller, sentencing the prisoners, said (p. 465):

> And the judges are unanimously of opinion that an accomplice alone is a competent witness; and that, if the jury, weighing the probabillty of his testimony, think him worthy of belief, a conviction supported by such testimony alone *is perfectly legal.*

And (p. 466):

> An accomplice, therefore, being a competent witness, and the jury in the present case having thought him worthy of credit, the verdict of guilty, which has been found, *is strictly legal,* though found on the testimony of the accomplice only.

See also:

Durham and Crowder (1787), 1 Leach C. L. 479.

Rex v. *Jones* (1809), 2 Camp. N. P. R. 132, 133; S. C., 31 How. St. Tr. 251.

Reg. v. *Mullins* (1848), 7 St. Tr. 1111–1113.

Reg. v. *Stubbs* (1855), Dearsley, C. C. 555.

Reg. v. *Boyes* (1859), 1 B. & S. R. 309.

It is quite evident from the foregoing citations that there was no *common-law rule* in England at the time of the passage of the judiciary act of 1789 in this country, which required instructions to juries that the testimony of accomplices must be corroborated. It is the common law (unless modified by decisions of the United States courts) which furnishes the rules of evidence in the trial of criminal cases in the Federal courts:

United States v. *Reid* (1851), 12 How. 360.

Logan v. *United States* (1891), 144 U. S. 263.

The position of the English courts upon the question has been sustained by numerous adjudications in State courts:

Commonwealth v. *Holmes* (1879), 127 Mass. 424.

Commonwealth v. *Bishop* (1896), 165 Mass. 148, 150, per Mr. Justice Holmes.

State v. *Green* (1896), 48 S. C. 136.

And in the Federal courts:

Steinham v. *United States* (1840?), 2 Paine, 168 (C. C., 2d circuit.)

Hanley v. *United States* (1903), 123 Fed. 850 (C. C. A., 2d circuit.)

United States v. *Guiliani* (1906), 147 Fed. 598 (D. C.).

Ahearn v, *United States* (1907), 158 Fed. 607 (C. C. A., 2d circuit.)

Richardson v. *United States* (1910), 181 Fed. 9 (C. C. A., 3d circuit.)

There was no rule of evidence under the common law, either at the time of the enactment of the judiciary act of 1789, or at the time of the admission of the State of California in 1850, requiring that the jury should be warned, or cautioned, or advised against accepting and acting upon the uncorroborated testimony of accomplices. *United States* v. *Reid* (1851), 12 How. 365; *Stat.*, California, 1850, c. 95.

The case of *People* v. *Eckett*, 16 Cal. 112, decided in 1860, cited by plaintiffs in error, held that the refusal of an instruction to the jury that they could not find the defendant guilty on the testimony of an accomplice, was erroneous, citing the case of *Regina* v. *Dyke*, 34 C. L. R. 381, and stating:

> It is held by this and other cases cited by appellant's counsel, that the corroborating evidence to the statements of an accomplice must connect the prisoner with the offence charged.

If this decision is intended to convey the idea that there was a common-law rule requiring an absolute instruction against convicting upon the uncorroborated testimony of an accomplice, it is palpably in conflict with the decisions of the English courts which have been heretofore cited, and is not sustained by the case cited.

In this connection it is pertinent to call attention to the note in Wigmore on Evidence (1904), page 2745, appended to the statement in the text:

> As a matter of common law, then, the doctrine was universally understood (*except by one or two courts*) as amounting to no rule of evidence, but merely to a counsel of caution given by the judge to the jury.

Referring to the exception "by one or two courts" the note reads:

> 1860, *People* v. *Eckert*, 16 Cal., 110 (misunderstanding some of the English cases).

Second. The trial court properly advised the jury.

Considering, then, the question of the correct practice, the instructions were likewise properly refused, because the trial court followed the usual custom and advised the jury fully and fairly as to the caution with which accomplice testimony should be received and weighed, saying (Rec., 40):

> The court instructs you on this subject that it is the settled rule in this country that even accomplices in the commission of crime are competent witnesses, and that the Government has the right to use them as witnesses. It is the duty of the court to admit their testimony, and that of the jury to consider it. The testimony of accomplices is, however, always to be received with caution, and weighed and scrutinized with great care. And the jury should not rely upon it unsupported, unless it produces in their minds the most positive conviction of its truth. It is just and proper in such cases for the jury to seek for corroborating facts and circumstances in other material respects; but this is not absolutely essential, provided the testimony of such witnesses produces in the minds of the jury full and complete conviction of its truth.

Whatever rights the defendants may have had in the premises were properly safeguarded by this instruction, which followed closely the general custom and practice established in the Federal courts.

Steinham v. *United States* (1840?), 2 Paine, 176–180 (C. C., 2d circuit).

Hanley v. *United States* (1903), 123 Fed. 851 (C. C. A., 2d circuit).

United States v. *Giuliani* (1906), 147 Fed. 598 (D. C.).

Richardson v. *United States* (1910), 181 Fed. 9 (C. C. A., 3d circuit).

Holmgren v. *United States* (1910), 217 U. S. 523–524.

So in the Federal court cases cited by the plaintiffs in error:

In the *Hinz* case, 35 Fed. 277 (plaintiffs in error's brief, p. 62): "Judges in their discretion will *advise* the jury," etc.

In the *Lancaster* case, 44 Fed. 864 (brief, p. 62): "Judges in their discretion will *advise* the jury," etc.

In the *Holmgren* case, 217 U. S. 509 (brief, p. 67): "It is undoubtedly the better practice for courts to *caution* juries," etc.

In the *Reagan* case, 157 U. S. 301 (brief, p. 68): "It is its (the court's) duty to *caution* the jury," etc.

In the case of *Reagan* v. *United States* (1894), 157 U. S. 301, it is true that Mr. Justice Brewer, for this Court, used the language quoted in plaintiffs in error's brief (p. 68):

> On behalf of the defendant it is its (the court's) duty to caution the jury not to convict upon the uncorroborated testimony of an accomplice. Indeed, according to some authorities, it should peremptorily instruct that no verdict of guilty can be founded on such uncorroborated testimony, and this because the inducements to falsehood on the part of an accomplice are so great.

In that case, however, no accomplice testimony was introduced and the question of a proper instruction regarding it was not before the court. The contention there arose over the court's instruction to the jury, with relation to the testimony of the defendant himself, which was claimed to be prejudicial. Necessarily the quoted language used was for illustrative purposes only and did not establish and was not intended to establish any rule of law.

Unquestionably, in certain cases such a state of facts may be presented to the court that a conviction upon the uncorroborated testimony of a single accomplice, or even accomplices, would virtually bring about a miscarriage of justice; and in such cases it is within the discretion of the court to properly warn the jury. The case of *Sykes* v. *United States*, 204 Fed. 913, relied upon by counsel for plaintiffs in error and quoted *in extenso* in their brief (brief, pp. 64–66), falls in that class. In that case the only testimony adduced to support the defendant's conviction was, in the language of Judge Sanborn (913):

> * * * the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the perpetration of her crime.

Under such a combination of facts and circumstances the clear duty rested upon the trial court to warn the jury, if not to instruct them positively, that conviction should not be had upon the sole testimony of such a witness. The Court of Circuit Appeals properly held it—

> * * * is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it.

There is nothing in that decision, however, to overturn the common-law rule that conviction may be had upon the uncorroborated testimony of accomplices. There the court simply found that the testimony presented in that particular case did not warrant a conviction. The testimony of any witness, whether accomplice or not, which presented such a tangled maze of self-contradiction and revengeful motive as is disclosed in that case, would warrant any court in reversing a conviction based solely upon it. Indeed, Judge Sanborn stated explicitly that the action of the court in that case constituted an exception to the general rule forbidding a review of the evidence which vested the court with authority to reverse a conviction where there was no evidence to sustain it, although the question was not properly raised by "request, objection, exception, or assignment of error."

No such condition prevails here. The testimony of the accomplice witnesses is contradicted, to be sure; but that contradiction is by the defendants

themselves, and by the defendants only. The desire of the defendants to escape punishment surely furnished as impelling a motive to color favorably, or even to falsify, their testimony, as the inferential hope for immunity from punishment could induce in the accomplice witnesses against them. The court below properly instructed the jury as to both phases. As to the testimony of the defendants, careful instructions were given (pp. 39, 40).

As to the testimony of accomplices, the court, as heretofore pointed out (Rec. 40), charged fully with relation to the caution with which it should be received, the care with which it should be scrutinized, and the necessity for corroboration, if it did not produce the most positive conviction of its truth; and, in addition, fully and fairly covered the matter of motive induced by promises or hope of immunity from punishment (Rec. 36).

The words "inferential hope of immunity," employed in the argument *supra*, are used advisedly. In their brief counsel for plaintiffs in error have taken occasion to go outside the record for supposed facts upon which to base an argument. For instance, on page 59 of their brief, the statement is made:

> In this case, as has been stated above, the Government allows certain of the defendants to plead guilty and then holds over them, until their testimony has been put in evidence, the amount of sentence to which they will be subjected.

There is absolutely nothing in the record of any character to indicate that the accomplice witnesses for the Government, or any of them, were ever promised immunity, were ever allowed to plead guilty, or that sentence was ever held over them. These are matters of pure assumption on the part of counsel and have no proper place in the brief. If any such facts existed, it was the privilege of counsel to develop them upon cross-examination of the witnesses during the trial. Such a line of cross-examination, to bring out facts which, if proved, would unquestionably affect the credibility of the witnesses, was entirely proper; and the inference is cogently compelled that if any such condition existed, such a line of examination would have been pursued. In any event, the unsupported allegations in which counsel now indulge can not be considered.

Third. There is ample corroborative evidence.

The whole objection of the plaintiffs in error to the instruction of the court is, however, without merit, because, as a matter of fact, in addition to the direct testimony of the witnesses who may be considered accomplices, there was ample corroborative evidence:

1. In the testimony of Joseph Head (Rec. 25, 26) as to (*a*) the finding of a quantity of opium and a suitcase with opium stains on the inside in the house of Soo Hing Fong, one of the defendants, with whom the witnesses Joseph (Rec. 16) and Reay (Rec. 17 and 18) testified they had had telephone conversa-

tions, and to whom they had repeatedly delivered opium taken from steamers, as charged in the indictment. The witness Reay further testified (Rec. 17) to delivering opium at Soo Hing Fong's residence; (*b*) the finding of a card in Miller's home containing the telephone numbers of Charles Reay, a customs guard, and Soo Hing Fong, both defendants here; of Leong Duck, who testified to the purchase of opium from Miller a number of times; of Chung Kai, to whom the witness Joseph testified (Rec. 15, 16) opium removed from various steamers had been delivered; of the society of which Leong Duck was a member; and of Wong Bat Mon, presumably a Chinaman.

2. In the testimony of Charles A. Stephens, a witness for the defendants (Rec. 22), who stated that he had met the defendant Brennan, who had assumed the name of Nicholas, the assumption of fictitious names by various of the defendants having been charged as an overt act in the indictment and testified to by several of the accomplice witnesses.

3. In the testimony of Joseph Head (Rec. 25, 26) as to the finding in the home of Miller, another of the defendants, of $2,000 in money, wrapped in a newspaper bearing the date upon which the witness Leong Duck testified he paid Miller $120 for opium.

ANSWER TO POINT III OF PLAINTIFFS IN ERROR'S BRIEF (pp. 48-58).

VI. The objection to admission of Taylor's testimony was properly overruled; and in any event it was not prejudicial.

The assignment (No. 51, Rec. 78, 79) complains that the court erred in overruling the objection of counsel to the competency of the witness A. J. Taylor. When this witness was tendered by the Government, in response to questions propounded to him by counsel for the defense, with the permission of the court, he testified that he had recently been convicted of a felony in the southern district of California, sentenced to two years in prison, had not been pardoned, and was then an inmate of the State prison. Counsel for defense moved that the testimony of the witness be excluded, and objected to his testifying upon the ground that he was an incompetent witness because of the facts stated by him. The objection was overruled and Taylor permitted to testify. This was not error; but if it was, was not prejudicial.

First. The disqualification of the witness was not properly proved.

Assuming that conviction of a felony would have disqualified the witness, the disqualification was not properly or sufficiently proved. The witness testified merely that he had been convicted of a felony, sentenced to two years' imprisonment, had not been pardoned, and was then serving a term in the State

prison. He did not state, nor was he interrogated as to the nature of the felony of which he had been convicted, nor any details as to time, trial, court, place of conviction, etc. Counsel for defense offered no record of his conviction to sustain the objection raised.

In *Commonwealth* v. *Green* (1822), 17 Mass. 512, it was discovered subsequent to the trial and conviction that a witness who testified during the trial had been convicted of a felony in the State of New York and was therefore incompetent. This fact was set up and it was forcibly and strenuously contended that it constituted proper ground for a new trial. Chief Justice Parker disposed of the contention in clear and convincing language (p. 536):

> The objection was not made at the trial. It could not have been made at that time, for the fact was probably not then known to the prisoner, certainly not to his counsel. It is very clear that the conviction of an infamous crime and judgment pursuant to it destroys the competency of the party as a witness. But it is equally clear that whenever that objection is made to a witness it must be supported by the record of the conviction and judgment. These must be produced and offered when the witness is about to be sworn or, at furthest, in the course of the trial. If that opportunity is omitted, it is no legal cause for setting aside a verdict that such a witness has testified in the cause.

> All the books which treat of this subject are positive and express in the declaration *that the party objecting must be prepared with the record and as some of them express it, come with it in his hand or he shall not be heard against the competency of the witness.* This rule is strict, and it ought to be so; for if anything short of a record should be admitted to impeach the competency of a witness, it would be easy for parties accused to protect themselves from punishment; and it would be in most cases impossible for the witness attacked, without previous notice, to defend his reputation. Not only must infamy be proved by record, *but the objection* **shall not be heard** [italicized in text] *without a record.* For otherwise the witness might be disqualified without cause; and no man ought to be allowed to charge another with an infamous crime and thereby deprive him of his standing in court as a witness without being ready to support the charge by evidence which can not be impugned. *If the suspected witness may himself be inquired of, whether he has been convicted, or, if other evidence than the record may be given, it is only to affect his credibility;* and he may contradict the evidence by testimony in favor of his character.

Underhill on Criminal Evidence (1910), sec. 206, p. 379, states the rule thus:

> The conviction of a witness of a crime which will render him incompetent must be proved by producing the judgment of conviction of a

certified copy thereof, and *can not be proved by his oral testimony on cross-examination.*

Greenleaf, Ev. 1, sec. 370, 372.

United States v. *Biebusch* (1880), 1 McCrary, 44.

Rex v. *Castell Careinion* (1806), 8 East T. R. 79.

United States v. *Sims* (1907), 161 Fed., 1009.

People v. *Herrick* (1816, N. Y.), 7 Am. Dec., 364, and note.

See also:

Bartholemew v. *People* (1822), 104 Ill. 601; *Castellano* v. *Peillon* (1824), 2 Martin, N. S. (La.) 468, 469; *Boyd* v. *State* (1894), 94 Tenn. 508, 512.

If a witness is incompetent to testify in a case because of his conviction, it is a curious and somewhat anomalous process of reasoning that leads to the conclusion that he is competent to testify to his own incompetency. The reason of the rule excluding him, as given by the text writers, is that the infamy and moral turpitude involved in the crime of which he is convicted has demonstrated that he is incapable of or indifferent to the truth. Yet it is proposed here to prove the vital fact rendering him unworthy of belief by the same individual who is not to be believed because of that fact. The sounder conclusion clearly appears to be that if he is incompetent to testify for one purpose, he is incompetent to testify for all, and that his incompetency must be shown by the record.

Second. Conviction of smuggling does not disqualify a witness.

In his testimony given after the objection was overruled the witness testified that he had been convicted of the offense of smuggling opium across the border into the southern district of California (Rec. 21) which was not an infamous crime within the contemplation of the common-law rule. It was a misdemeanor only and did not disqualify the witness.

> Blackstone, Com., Book 4, p. 155: This (smuggling) is restrained by a great variety of statutes which inflict pecuniary penalties and seizure of the goods for clandestine smuggling, and affixes the guilt of felony, with transportation for seven years, upon more open, daring, and avowed practices.
>
> Russell's Law of Crime (1910), vol. 1, p. 371: A conspiracy to defraud the Crown of customs duties is a misdemeanor indictable at common law.
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> Bacon, Abr. v. 9, "Smuggling."

The more open, daring, and avowed practices refer to forcible acts of smuggling (19 Geo. 2, c. 34), and involved the combination of three or more persons, the use of arms, force, or in some instances disguises. Conviction for clandestine smuggling was punishable by a fine of 100 pounds and forfeiture of the goods. Such a conviction then would not have affected the competency of a witness. A conviction for the same offense now would not disqualify a witness unless the punishment fixed brings it within

the condemnation of the common-law rule. Under the criminal code of the United States (sec. 335) every crime is denominated a felony which may be punished by "imprisonment for a term exceeding one year." Under this denomination many crimes are now felonies which were not so under the common law. To hold that conviction of crimes of that character, many of them involving no infamy and no moral turpitude, renders a witness incompetent in the courts of the United States, extends the common-law rule to limits it was never designed to reach, and is a backward step in the steady progress which has been made toward the abolition of the rule altogether—a progress which is aptly described by Mr. Justice Brewer in *Benson* v. *United States* (1892), 146 U. S. 337:

> The spirit of this legislation has controlled the decisions of the courts, and steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed, till now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence.

Discussing this tendency toward an abolition of the common-law rule, Wigmore on Evidence (1904), par. 519, p. 650, says:

> There can be, then, no justification for the disqualification of a person by reason of conviction of crime; and legislation has now in most jurisdictions recognized this, with more or less thoroughness, by *abolishing the common-law rule.* In a few jurisdictions, nevertheless, it remains in full scope (though defined by statute), and in many others it is retained for the crime of perjury. These anachronisms ought not to be longer countenanced.

The character of crime for which conviction disqualified a witness is fully discussed in *Ex parte Wilson* (1884), 114 U. S. 422, 423. The actual decision was as follows (p. 429):

> Deciding nothing beyond what is required by the facts of the case before us, our judgment is that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime *within the meaning of the fifth amendment of the Constitution;* and that the District Court, in holding the petitioner to answer for such a crime and sentencing him to such imprisonment without indictment or presentment by a grand jury, exceeded its jurisdiction, and he is therefore entitled to be discharged.

In view of the distinction so sharply and definitely drawn, it is quite apparent that this Court did not decide, and did not intend to decide in that case, that conviction of a crime punishable by imprisonment in the penitentiary necessarily carried with it that degree of infamy which rendered a man incompetent as a witness under the common-law rule.

This Court, in the case of *Reagan* v. *United States* (1894) 157 U. S. 301, distinctly held (pp. 303, 304) that smuggling was not a felony.

The same conclusion was reached in *United States* v. *Shepard* (1870) 1 Abb. 431 (D. C.). In that case the defendant was charged with smuggling and the court held that the offense was not infamous, although it might involve imprisonment in the penitentiary, and that conviction of it would not disqualify a witness.

See also:

United States v. *Block* (1877), 4 Sawy. 211 (D. C.).

United States v. *Sims* (1907), 161 Fed. 1008 (D. C.).

Keliher v. *United States* (1912), 193 Fed. 23 (C. C. A. 1 Cir.).

Both the *Reagan* case and the *Shepard* case, *supra*, arose and prosecutions were instituted under section 4 of the act of July 18, 1866 (14 Stat. 179), now section 3082, Revised Statutes. That section of the act is still in force, and, in the absence of any showing to the contrary in the record in this case, presumably was the statute under which the witness Taylor was indicted and convicted.

Bearing in mind the statement by this Court in the *Wilson* case, *supra*, that it was the character of the crime and not the nature of the punishment which disqualified the convict from testifying, it is difficult to perceive how the enactment of section 335 of the Criminal Code, denominating all offenses felonies

which might be punished by imprisonment exceeding one year, can now render an offense infamous within the meaning of the common-law rule which was not so before. The sounder and more rational theory is that section 335, Criminal Code, was enacted by the Congress to put a stop to the endless confusion constantly arising in the courts in the endeavor to distinguish felonies from misdemeanors in matters of practice and procedure, and that it was not contemplated and not intended to completely change the application and broaden and extend the limits of a rule gradually becoming obsolete and which in all good conscience ought to be entirely so.

It may be remarked that the common-law disqualification of witnesses convicted of crime was abolished by statute in England in 1843. (7 Vict. c. 85.)

Third. The testimony was not prejudicial to defendants.

The testimony given by the witness Taylor (Rec. 21), as heretofore pointed out, related wholly to subscriptions by certain of the defendants toward the bond and counsel fee for one Marney, charged with smuggling, and a meeting at the house of the defendant Ellison for the purpose of arranging these matters. Testimony as to the meeting at the house of Ellison and the raising of money for the purpose of securing bond and employing counsel for Marney was given by the witness Joseph (Rec. 16). The witness Reay (Rec. 18) and the witness McGough (Rec. 19) testified that they had been requested by others of the

defendants to subscribe to the fund to be used for securing bond and counsel for Marney, but declined to do so.

Eliminating Taylor's testimony entirely, there were the clear and unequivocal statements of the witness Joseph, the witness Reay, and the witness McGough to the same occurrence, each of which, standing independently and without corroboration, as they necessarily were considered under the instruction of the court, was sufficient to justify full belief in the transaction.

The defendants were charged in the indictment with eighteen other and distinct overt acts besides the one to which the witness Taylor testified. There was clear and direct testimony as to a number of these acts, and corroborative testimony as to the existence of the conspiracy. This testimony, if credible, was amply sufficient to prove the conspiracy. Subscriptions to funds for bond and counsel fees for Marney, *per se*, involved no criminality whatever, while each of the other overt acts did. *If the testimony as to the entire Marney transaction had been wholly eliminated from consideration, it would have been impossible for any reasonable mind, which attached any appreciable degree of credence to the direct and corroborative testimony of the other witnesses for the Government as to the long series of transactions, each of which involved a criminal violation of the law, to have reached any other conclusion than the jury did reach.*

Even if the witness Taylor was wholly incompetent, it is earnestly insisted that the error in admit-

ting his testimony was not prejudicial to the defendants, because:

1. He testified to but a single transaction out of nineteen overt acts charged, was one of four testifying to that particular transaction, was a self-confessed convict with weakened credibility, the transaction was sufficiently proved by the testimony of any one of the other witnesses, none of whom he could corroborate, and his testimony could have had but slight, if any, effect upon the minds of the jury.

2. All of the testimony as to subscriptions to bond and counsel fees for Marney could have been wholly eliminated from consideration without weakening the Government's case to any appreciable extent.

As stated by Mr. Chief Justice Fuller in *Mammoth Min. Co.* v. *Salt Lake Machine Co.* (1894), 151 U. S. 447, 451:

> The evidence thus objected to was cumulative in its character and not of controlling importance, and, if excluded, it is sufficiently clear that the result would not have been otherwise than it was.

See also *Cooper & Co.* v. *Coates & Co.* (1874), 21 Wall. 110. The same rule applies with respect to criminal cases.

Motes v. *United States* (1899), 178 U. S. 458.

Fourth. Plaintiffs in error have admitted that the testimony was immaterial.

The plaintiffs in error assigned as error (No. 43) the failure of the court to charge that the Marney subscription fund evidence did not constitute evidence of an overt act. They have not discussed this assign-

ment in their brief and hence have waived it. Assuming, however, that their contention was correct and that it did not constitute evidence of an overt act, then it was evidence of an entirely immaterial and irrelevant fact, and Taylor was in the position of a witness who has testified to a purely immaterial fact, and hence his testimony was not prejudicial.

ANSWER TO POINT II OF PLAINTIFFS IN ERROR'S BRIEF. (PP. 45–48.)

VII. The court did not err in admitting the testimony of witness Head as to the finding of $2,000 in the home of the defendant Miller.

First. The testimony was relevant.

In brief, the witness Head testified (Rec. 25, 26) that during his search of Miller's flat on July 3, 1913, under a search warrant, which was exhibited on trial, he found $2,000 wrapped in a San Francisco newspaper of date *July 2, 1913*, in a bureau drawer in a room in the flat. Upon cross-examination the witness testified that he found the money in a room in Miller's flat occupied by a man named Hammel, and that Hammel claimed it was his money; that later he ascertained that Hammel was an employee of the Pacific States Telephone Company and had been employed as an inspector of lines for approximately a year. It may be remarked here that nothing whatever is shown in the record to indicate that Hammel had any connection with the offense charged against the defendants, and no further testimony with relation to him was introduced.

The witness Leong Duck testified (Rec. 21) that he knew the defendant Miller, had been at his residence, giving the street number in the city of San Francisco, about seven or eight times; that he was there on *July 2, 1913*, was arrested about a block and a half away, a package taken from him which he had gotten from Miller, for which he paid the latter $120, and that he had obtained many similar packages from him.

In support of their contention that Head's testimony was irrelevant, immaterial, and incompetent, and constituted prejudicial error, plaintiffs in error rely upon the case of *Williams* v. *United States*, 168 U. S. 382. An analysis of that case clearly develops that it differs materially from that at bar. The defendant there was convicted of extortion while acting as a United States Chinese inspector. No charge of conspiracy was involved. Over objection, the Government introduced evidence showing that the defendant had $4,750 deposited in bank.

The trial court, in effect, instructed the jury that the failure of the defendant to account for the possession of this $4,750, when his salary was not in excess of $150 per month, was sufficient evidence to warrant a conviction for extorting $185.

This court held both the instruction and the admission of the evidence erroneous, for lack of sufficient connection between the testimony and the offense charged, no deposits of sums approximating the amounts charged to have been illegally received having been shown.

The case at bar stands on a different footing. It must be borne in mind that it involves a charge of conspiracy, an offense which often can be proved by indirect and circumstantial evidence only. It is unusual for a man to keep in his home as large a sum of money as was found in the defendant Miller's flat, not secreted, but merely wrapped in a newspaper and placed in a bureau drawer. This logical inference is that the money had been placed there only temporarily and recently, and the date of the newspaper in which it was wrapped indicated that it had been done no earlier than the day before. The testimony of the witness Leong Duck that he had paid Miller the sum of $120 on that day, when considered in connection with the testimony of various other witnesses as to the quantities of opium Miller had removed from divers steamships, some of which had been delivered to his residence, and his numerous and extensive dealings with a number of Chinamen in disposing of the opium so removed, establishes such a logical connection between the finding of the money under the circumstances detailed and the testimony of the other witnesses, and especially the witness Leong Duck, as to render it material and relevant and take it entirely out of the decision in the *Williams* case. Certainly it tends to corroborate the testimony of some of the accomplice witnesses.

In the *Williams* case, too, this court criticized both the instruction and the admission of the testimony and found other reversible error.

The record here does not show that any effort was made or any testimony introduced by the prosecution to show Miller's financial condition, income, salary, manner of life and habits of expenditure, or environment, as suggested by counsel for plaintiffs in error on page 48 of their brief. In the absence of any attempt to make such proof or any reference whatever to the matter, it is clear that no such inference was sought to be established by the prosecution here as in the *Williams* case.

Second. The testimony was not prejudicial.

Assuming, however, that the admission of Head's testimony as to the finding of the money was error, and that standing alone it might have been prejudicial to the defendants, it was neutralized by his testimony on cross-examination to the effect that the money was found in the room of a man who claimed it as his own, and who is not shown to have had the slightest connection with the conspiracy. In view of the fact that the court gave no instruction to the jury which had any tendency to cause them to attach any particular weight to the testimony of this witness, it seems apparent that its admission, if erroneous, was not prejudicial.

CONCLUSION.

The judgment of the District Court should be affirmed.

CHARLES WARREN,
Assistant Attorney General.

JANUARY, 1915.

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BROLAN *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 645. Submitted January 5, 1915.—Decided February 23, 1915.

In a case from the District Court, if the power to review attaches because of a constitutional question, that authority gives rise to the duty of determining all the questions involved, including those that otherwise are within the exclusive jurisdiction of the District Court, but if the constitutional question asserted as the basis for jurisdiction of this court is frivolous, this court has no power to review it or any of the other questions involved. The writ of error must be dismissed.

The absolute power expressly conferred upon Congress to regulate foreign commerce involves the existence of power to prohibit importations and to punish the act of knowingly concealing or moving merchandise which has been imported in successful violation of such prohibition. *Keller* v. *United States*, 213 U. S. 138, distinguished.

The contention in this case that § 2 of the Act of February 9, 1909, c. 100, 35 Stat. 614, regulating the importation of opium, is unconstitutional as beyond the power of Congress, has been so foreclosed by prior decisions of this court that it is frivolous and affords no basis for jurisdiction of this court under § 238, Judicial Code.

THE facts, which involve the jurisdiction of this court under § 238, Judicial Code, are stated in the opinion.

Mr. Edward M. Cleary, Mr. John L. McNab, Mr. Bert Schlesinger, Mr. S. C. Wright and *Mr. P. S. Ehrlich*, for plaintiffs in error.

Mr. Assistant Attorney General Warren for the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The indictment against the plaintiffs in error contained two counts: The first charged a conspiracy to wrongfully import opium into the United States in violation of the first portion of § 2 of the act of February 9, 1909, c. 100, 35 Stat. 614. The second charged a conspiracy to unlawfully receive, conceal and facilitate the transportation of opium which had been wrongfully imported into the United States with knowledge of such previous, illegal importation in violation of the latter part of the section referred to. The first count was quashed on the ground that the overt acts alleged occurred after the illegal importation or smuggling which was counted on. On the second count there was a conviction and sentence and this direct writ of error to the trial court is prosecuted to reverse the same. The right to a reversal rests upon two propositions: the one, that the clause of the section upon which the second count was based is repugnant to the Constitution of the United States because beyond the legislative power of Congress to enact and because moreover its provisions intrinsically constitute a usurpation of the powers reserved to the States by the Constitution; and the other, the insistence that various material errors were committed by the trial court during the progress of the case aside from the constitutionality of the statute.

Our jurisdiction to directly review depends upon the constitutional question since the other matters relied upon are as a general rule within the exclusive jurisdiction of the Circuit Court of Appeals of the Ninth Circuit, although if power to review attaches to the case because of the constitutional question, that authority gives rise to the

duty to determine all the questions involved. *Burton* v. *United States*, 196 U. S. 283; *Williamson* v. *United States*, 207 U. S. 425, 432; *Billings* v. *United States*, 232 U. S. 261, 276. Under these circumstances to prevent a disregard of the distribution of appellate power made by the Judicial Code and to see to it that there is something on which our jurisdiction to review can rest, it behooves us in this as in all other cases to see whether the question upon which our power depends is really presented, and if not, because although in form arising it is in substance so wholly wanting in merit as to be frivolous, to decline the exercise of jurisdiction. *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Hendricks* v. *United States*, 223 U. S. 178.

Coming to that subject the entire absence of all ground for the assertion that there was a want of power in Congress for any reason to adopt the provision in question is so conclusively foreclosed by previous decisions as to leave no room for doubt as to the wholly unsubstantial and frivolous character of the constitutional question based upon such contention. In *Buttfield* v. *Stranahan*, 192 U. S. 470, in stating the previously settled doctrine on the subject it was said, p. 492:

"The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. *Lottery Case*, 188 U. S. 321, 353–356; *Leisy* v. *Hardin*, 135 U. S. 100, 108. Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes,

but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines, and chemicals entitled to admission into the United States and excluding such as did not equal the standards adopted. 9 Stat. 237, chap. 70; Rev. Stat., § 2933, U. S. Comp. Stat. 1901, p. 1936." And see *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 334, 335; *The Abby Dodge*, 223 U. S. 166, 176.

Nor is there any ground upon which to rest the contention that although under this settled doctrine it is frivolous to question the power of Congress to prohibit importations and punish a violation of such prohibition, it is open to controversy and therefore not frivolous to contend that there is a want of power to prohibit and punish the act of knowingly concealing or moving merchandise which has been successfully imported from a foreign country in violation of the prohibitions against such importations. This conclusion is inevitable since it is obvious that to concede that the wrongful and successful evasion of the prohibition against bringing in imported merchandise or of knowingly, in violation of a further prohibition, dealing with such merchandise was beyond the scope of the complete power to prohibit importation, would be in substance to deny any power whatever. Indeed, it is evident that a power to prohibit which is operative and effective only as long as its prohibitions are not disobeyed is not an absolute power but is scarcely worthy of being denominated a relative one. But the authority being absolute, it follows that the right to assert it must endure and reach beyond the mere capacity of persons to evade its com-